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RESTORING THE GRAND SECURITY: THE DEBATE OVER A FEDERAL BILL OF RIGHTS, 1787-1792

John P. Kaminski

From 1763 until 1791, Americans debated the nature of government and how best to preserve liberty.¹ Halfway through this debate, most Americans decided that their liberties could best be preserved outside of the British Empire.² In rebelling against the British government, Americans did not turn their backs on government in general. On the contrary, they fervently believed that government was essential in protecting the rights of individuals. This captivation with government found its way into the fundamental documents of the new states.³

The propriety, and indeed, necessity, of a bill of rights protecting individual freedoms and liberties was a much less clear-cut issue during this time. Generally, Federalists, those who supported ratification of the Constitution, felt that a separate Bill of Rights was unnecessary, and even dangerous. The Antifederalists, however, fervently believed that the original Constitution was gravely flawed precisely because it lacked a bill of rights.

This article traces the history of the development of the Federal Bill of Rights. Part I is a brief description of the prelude to the Constitution, the Articles of Confederation. It is not surprising that the first instrument of the Union for the nation contained virtually no provisions protecting individual rights.⁴ Such guarantees were unnecessary given the fact that the government set up by the Articles could not act on individuals directly - it could only act on the state.⁵ Part II describes the process by which the Constitutional Convention drafted the original Constitution in 1787. When the federal Constitution was written, the framers followed the precedent of the Articles

1. 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 52 (John P. Kaminski et al. eds., 1976) at 52 [hereinafter 1 DOCUMENTARY HISTORY OF THE RATIFICATION].

2. 1 *id.*

3. See generally 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 179-81 (1971).

4. 1 *id.* at 383.

5. 1 *id.*

insofar as a Bill of Rights was concerned.⁶ The issue was considered this time, however, and hotly debated.⁷

Parts III and IV examine the Antifederalists' campaign against the omission of a Bill of Rights and the Federalists' responses, respectively. In Part V the article describes the ratifying conventions which took place in each state. Part VI describes the subsequent process by which the first 10 amendments to the Constitution - the Bill of Rights - were adopted.

I. PRELUDE TO THE CONSTITUTION - THE ARTICLES OF CONFEDERATION

In June 1776, the Virginia revolutionary convention adopted a new state constitution and preceded it with a declaration of rights that maintained

"That all Men are by Nature equally free and independent, and have certain inherent Rights, of which, when they enter into a State of Society, they cannot by any Compact, deprive or divest their Posterity; namely, the Enjoyment of Life and Liberty, with the Means of acquiring and possessing Property, and pursuing and obtaining Happiness and Safety."⁸

Delegates to the Second Continental Congress meeting in Philadelphia a month later pronounced similar self-evident truths.⁹

As soon as Americans tore down one government, they immediately began the process of adopting new ones.¹⁰ Provincial assemblies created new state constitutions that established governments that would not endanger liberty—governments with real power lodged in state assemblies and little authority placed in the upper houses of the legislatures and the new state governors.¹¹ On the federal level, in 1777 the Continental Congress drafted, and the state legislatures subsequently adopted, the Articles of Confederation, which provided for a single-house Congress with no power over individuals.¹²

6. 1 *id.* at 384.

7. See *infra* part II.

8. 1 DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA 142 (David Robertson ed., 1788-1789), [hereinafter 1 VIRGINIA DEBATES].

9. 1 SCHWARTZ, *supra* note 3, at 264.

10. 1 *id.* at 228-30.

11. 1 *id.* at 231-375.

12. ACT OF CONFEDERATION OF THE UNITED STATES OF AMERICA art. V, reprinted in 1 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 1, at 87-88. See 1 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 1, at 78 for an overview of the ratification of the Constitution.

States—not people—were represented in Congress, and Congress had only limited power over the states.¹³ Article II unequivocally placed ultimate authority in the states, not in the federal government.¹⁴ “Each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.”¹⁵

A decade after declaring their independence, most Americans believed that the Articles of Confederation were defective.¹⁶ Some believed that the Articles could become effective if Congress were given a few additional powers—particularly the power to raise revenue through its own authority and the power to regulate foreign and domestic trade.¹⁷ Others, however, felt that more radical change was necessary—something had to be done to limit the state legislatures and invigorate Congress.¹⁸ Without a strengthened general government, the union would disintegrate into civil war or anarchy, which would eventually lead to despotism. Republicanism and the principles of the Revolution, many believed, were hanging by a thread.¹⁹

II. THE CONSTITUTIONAL CONVENTION OF 1787

Most of the delegates who attended the Constitutional Convention during the spring and summer of 1787 had come to Philadelphia with a propensity to add significant powers to their federal government.²⁰ They did not feel that their primary purpose was to protect the rights of Americans from the powers of the general government.²¹ Two other purposes predominated: delegates wanted either to strengthen the powers of Congress by amending the Articles of Confederation or by creating an entirely new constitution with a federal government armed with coercive power over the states and their citizens. Alternatively, delegates wanted to limit the powers of

13. *Id.*

14. *Id.* arts. II, V at 87-88.

15. ACT OF CONFEDERATION OF THE UNITED STATES OF AMERICA art. II, *reprinted in* 1 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 1, at 87-88.

16. *See generally* 1 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 1, at 140-74.

17. 1 *id.* at 140.

18. 1 *id.* at 141.

19. 1 SCHWARTZ, *supra* note 3, at 435 (quoting George Washington) (“[T]he confederation appears to me to be little more than a shadow without the substance; and congress a nugatory body, their ordinances being little attended to.”).

20. 1 *id.*

21. 1 *id.*

the state governments that were dominated by popularly elected assemblies which enacted legislation that frequently violated the rights of the minority.²² With these goals, it is not surprising that the Constitutional Convention failed to propose a federal bill of rights.²³ Only through strengthening the powers of responsible government and restricting the licentiousness of the people and state assemblies would the principles of the Revolution be preserved.²⁴

The Constitutional Convention incorporated a number of individual rights into its draft constitution.²⁵ Not until late in the Convention, however, was a general bill of rights suggested.²⁶ On September 12, George Mason, author of the Virginia Declaration of Rights, stated that he "wished the plan had been prefaced with a Bill of Rights."²⁷ Such a written guarantee, Mason asserted, would "give great quiet to the people; and with the aid of the State declarations, a bill might be prepared in a few hours."²⁸ Elbridge Gerry of Massachusetts agreed and proposed that a committee be appointed to draft a bill of rights.²⁹ Roger Sherman of Connecticut, the only delegate recorded on the subject, objected to such a committee.³⁰ He wanted the rights of the people protected, but believed that a federal bill of rights would be superfluous, because the state bills of rights were not repealed and were thus sufficient.³¹ Still committed to a strengthened general government—not to restrictions on it—the delegates defeated the motion for a committee to draft a bill of rights by a vote of ten states to none.³²

22. See, e.g., Letter from James Madison to George Washington (Sept. 30, 1787) in SCHWARTZ, *supra* note 3, at 440-42.

23. See 1 SCHWARTZ, *supra* note 3, at 436-37.

24. See, e.g., Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 447 (John P. Kaminski et al. eds., 1981) [hereinafter 13 DOCUMENTARY HISTORY OF THE RATIFICATION]. James Madison carried this view further than other delegates were prepared to go: "A constitutional negative on the laws of the States seems equally necessary to secure individuals agst. encroachments on their rights. The mutability of the laws of the States is found to be a serious evil. The injustice of them has been so frequent and so flagrant as to alarm the most stedfast friends of Republicanism. I am persuaded I do not err in saying that the evils issuing from these sources contributed more to that uneasiness which produced the Convention, and prepared the public mind for a general reform, than those which accrued to our national character and interest from the inadequacy of the Confederation to its immediate objects." *Id.*

25. 1 SCHWARTZ, *supra* note 3, at 436.

26. 1 *id.*

27. 1 *id.* at 438.

28. 1 *id.*

29. 1 *id.* at 438.

30. 1 *id.* at 436.

31. 1 *id.*

32. 13 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 24, at 195-99

The delegates' opposition to a federal bill of rights almost proved fatal to the new Constitution. Opponents of the Constitution, called Antifederalists, incessantly referred to this omission as proof that a conspiracy was afoot to subvert the principles of the Revolution and deprive Americans of their dearly bought rights.³³ Supporters of the Constitution, called Federalists, devised arguments to explain the omission—arguments that convinced few Antifederalists that the Constitution did not need a bill of rights.³⁴ Throughout the ratification debate (1787-1788), the lack of a federal bill of rights remained the single most important issue.

When the delegates to the Constitutional Convention adjourned on September 17, 1787, they sent their new Constitution to the Confederation Congress in New York City, requesting that it be forwarded to the states for their ratification.³⁵ Congress read the Constitution on September 20 and assigned the 26th for its consideration.³⁶

Though a small minority in Congress, Antifederalists took the lead against the Constitution. Nathan Dane of Massachusetts asked that the Constitution be forwarded with the acknowledgment that the delegates to the Constitutional Convention had violated their instructions as well as the Articles of Confederation.³⁷ Federalists argued that the Constitution should be sent to the states with congressional approbation.³⁸

Former president of Congress Richard Henry Lee of Virginia proposed that the Constitution be forwarded to the states with an accompanying bill of rights.³⁹ Such a document had been found from universal experience to be absolutely "necessary to protect the just rights and liberty of mankind from the silent, powerful, and ever active conspiracy of those who govern."⁴⁰ Most of the states had adopted bills of rights

(John P. Kaminski et al. eds., 1981) [hereinafter 13 DOCUMENTARY HISTORY OF THE RATIFICATION].

33. ELBRIDGE GERRY, OBSERVATIONS ON THE NEW CONSTITUTION AND THE FEDERAL AND STATE CONVENTIONS (1788), *reprinted in* 1 SCHWARTZ, *supra* note 3, at 481-93.

34. JAMES IREDELL, ANSWERS TO MR. MASON'S OBJECTIONS TO THE NEW CONSTITUTION (1788), *reprinted in* 1 SCHWARTZ, *supra* note 3, at 449-59.

35. 1 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 1, at 305.

36. 1 *id.* at 322.

37. 13 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 24, at 229-30; *see* Mr. Dane's Motion respecting New Constitution, (Sept. 26, 1787), *reprinted in* 13 *id.* at 231-32.

38. 13 *id.* at 230.

39. 13 *id.* at 239.

40. 13 *id.* at 238-39.

to restrain and regulate the exercise of the great powers necessarily given to Rulers—In conformity with these principles, and from respect for the public sentiment on this subject it is submitted that the new Constitution . . . be bottomed upon a declaration, or Bill of Rights, clearly and precisely stating the principles upon which this Social Compact is founded.⁴¹

Lee proposed that freedom of religion, freedom of the press, the right to assemble, and the right to petition be protected.⁴² In judicial matters, he wanted due process of law guaranteed as well as the right to jury trials of the vicinage in both criminal and civil cases.⁴³ Excessive bail and fines, cruel and unusual punishments, and unreasonable searches and seizures were to be prohibited.⁴⁴ Federal elections should be free and frequent, while standing armies in peacetime were to be prohibited unless approved by a two-thirds majority in both houses of Congress.⁴⁵

In a compromise between Federalists and Antifederalists, Congress agreed on September 28, 1787, to send the Constitution to the states with neither approbation nor disapprobation.⁴⁶ Antifederalists agreed to strike the debate over the Constitution—including Lee's bill of rights—from the journals.⁴⁷ Federalists, who could have easily outvoted their adversaries, were thereby able to hide from the public the fact that Congress was divided over the Constitution.⁴⁸ The Constitution had run the congressional gauntlet and escaped to the states unscathed.⁴⁹ Federalists wanted the states to consider the Constitution as written by the Constitutional Convention.⁵⁰ If Congress amended the new Constitution, James Madison asserted, there would be two plans before the states. "Some will accept one & some another, this will create confusion."⁵¹ Antifederalists, on the other hand, were able to deny the Constitution the endorsement of Congress.⁵² They knew that Congress would never accept their proposal for an accompanying bill of rights. By depriving the Constitution of

41. 13 *id.* at 239.

42. 13 *id.*

43. 13 *id.*

44. 13 *id.* at 239.

45. 13 *id.*

46. 13 *id.* at 241.

47. 13 *id.*

48. 13 *id.*

49. 13 *id.*

50. 13 *id.* at 238.

51. 13 *id.*

52. 13 *id.* at 241.

the endorsement of Congress, Antifederalists felt that they had accomplished all that their limited numbers could expect. They knew that a national debate over a federal bill of rights would soon erupt in the press where they would try to convince the public of the necessity of restrictions on federal power.⁵³ In commenting on the congressional action, George Washington told James Madison that he was

better pleased [that the Constitution was] "handed from Congress by a unanimous vote (feeble as it is) than if it had appeared under stronger marks of approbation without it. This apparent unanimity will have its effect. Not every one has opportunities to peep behind the curtain; and as the multitude often judge from externals, the appearance of unanimity in that body, on this occasn., will be of great importance."⁵⁴

III. ANTIFEDERALISTS' CAMPAIGN AGAINST THE OMISSION OF A BILL OF RIGHTS

Antifederalists began their campaign against the Constitution's omission of a bill of rights immediately after the Constitutional Convention adjourned.⁵⁵ George Mason gave Elbridge Gerry and Philadelphia Antifederalists copies of his objections to the Constitution, which began with a thunderous "There is no Declaration of Rights."⁵⁶ Soon Mason's objections circulated throughout the country in manuscript form, and, starting in mid-November, the objections were printed in newspapers throughout the country, as broadsides, and in several pamphlet anthologies.⁵⁷

Richard Henry Lee sent copies of his amendments to correspondents in Massachusetts, Pennsylvania, and Virginia.⁵⁸ Paraphrasing Blackstone's *Commentaries*, Lee wrote to Samuel Adams, the old revolutionary who was now president of the Massachusetts Senate, that "the corrupting power, and its insatiable appetite for increase, hath proved the necessity, and procured the adoption of the strongest and most express declarations of that *Residuum* of natural rights, which is not intended to be given up to Society, and which indeed is

53. 13 *id.* at 238.

54. Letter from George Washington to James Madison (Oct. 10, 1787) *reprinted in* 13 *id.* at 358..

55. 1 SCHWARTZ, *supra* note 3, at 443-44.

56. 1 *id.* at 443; *see* George Mason's Objections to the Proposed Federal Constitution (1787), *reprinted in* 1 SCHWARTZ, *supra* note 3, at 444.

57. 13 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 24, at 346-48.

58. 13 *id.* at 364-66.

not necessary to be given for any good social purpose."⁵⁹

By the end of September 1787, the Antifederal minority of the Pennsylvania assembly publicly asked their constituents whether they were willing to give up freedom of the press and trial by jury and "whether in a plan of government any declaration of rights should be prefixed or inserted."⁶⁰ Before surrendering their "great and valuable privileges up forever," Pennsylvanians were asked to compare their state Declaration of Rights with the new federal Constitution. "All the blessings of liberty and the dearest privileges of freemen [were] now at stake" and depended on their actions.⁶¹

In New York, "Brutus" led the fight in the familiar terms of the natural rights philosophy. "The common good . . . is the end of civil government, and common consent, the foundation on which it is established. To effect this end, it was necessary that a certain portion of natural liberty should be surrendered, in order, that what remained should be preserved."⁶² Although uncertain how much natural freedom should be surrendered, "Brutus" felt that government should be authorized

to establish laws to promote the happiness of the community and to carry those laws into effect. But it was not necessary . . . for individuals to "relinquish all their natural rights. Some are of such a nature that they cannot be surrendered. . . [while others were] "not necessary to be resigned, in order to attain the end for which government is instituted. . . . To surrender these rights would counteract the very end of government, to wit, the common good. . . . [Consequently,] in forming a government on its true principles, the foundation should be laid . . . by expressly reserving to the people such of their essential natural rights, as are not necessary to be parted with."⁶³

These principles, "Brutus" asserted, were fundamental and were embodied "in all the constitutions of our own states . . . when the pulps [sic] of liberty beat high" just a decade earlier.⁶⁴ Now, however, "Brutus" was astonished "that this grand security, to the rights of the people, is not to be found" in the proposed Constitution.

59. 13 *id.* at 323. "Brutus," New York's most important Antifederalist essayist, echoed Lee in the January 17, 1788 *New York Journal*: "There are certain rights which mankind possess, over which government ought not to have any controul [sic]." 13 *id.* at 393.

60. 13 *id.* at 296.

61. 13 *id.* at 329.

62. 13 *id.* at 525 (quoting Brutus in the November 1, 1787 edition of the *New York Journal*). Evidence indicates that "Brutus" might have been Melancton Smith.

63. 13 *id.*

64. 13 *id.*

Federalists were clearly on the defensive; they needed an explanation for the omission of a federal bill of rights.⁶⁵

IV. FEDERALISTS' RETORT AS TO THE OMISSION OF A BILL OF RIGHTS

During the first week of October 1787, Pennsylvanians campaigned for their elections to the state assembly.⁶⁶ On October 6, James Wilson, Pennsylvania's most prominent lawyer who had a decade earlier signed the Declaration of Independence, gave the first public explanation of the new Constitution by a former delegate to the Constitutional Convention.⁶⁷ Wilson, one of the Convention's most influential delegates, asserted that there was a fundamental difference between state constitutions and the Constitution of the United States.⁶⁸ When people created their state governments, they invested their legislatures "with every right and authority which they did not in explicit terms reserve."⁶⁹ Therefore, whenever the state constitution was silent, the legislature's "jurisdiction is efficient and complete."⁷⁰ But in delegating federal powers, "congressional authority is to be collected, not from tacit implication, but from the positive grant expressed in the instrument of union."⁷¹ Consequently, in state constitutions "every thing which is not reserved is given," but under the federal Constitution "every thing which is not given, is reserved."⁷² Once Antifederalists realized this important distinction, Wilson felt that they would accept the omission of a federal bill of rights.⁷³

Wilson also argued that a federal bill of rights would be dangerous because it would imply that the federal government had "some degree of power" in every area, even though no specific powers were delegated.⁷⁴ James Madison agreed with Wilson, explaining in a letter to Thomas Jefferson that he favored a bill of rights if one could be written without giving the federal government enor-

65. 13 *id.*

66. 1 SCHWARTZ, *supra* note 3, at 167-68.

67. JAMES WILSON, AN ADDRESS TO A MEETING OF THE CITIZENS OF PHILADELPHIA (1787), reprinted in 1 SCHWARTZ, *supra* note 3, at 528-32.

68. 1 *id.* at 528.

69. 1 *id.*

70. 1 *id.*

71. 1 *id.* at 529.

72. 1 *id.*

73. 1 *id.*

74. 1 *id.*

mous powers by implication.⁷⁵

Wilson's theory of reserved powers became the "official" Federalist explanation for the lack of a federal bill of rights.⁷⁶ Antifederalists attacked it. "Agrippa" called the reserved power theory "a mere fallacy, invented by the deceptive powers of Mr. Wilson."⁷⁷ Confederation Treasury Board member Arthur Lee of Virginia accused Wilson of sophistry.⁷⁸ His quaint conundrum was, in essence, "a distinction without difference."⁷⁹ Why should Americans accept Wilson's "play on words," when a real safeguard could easily have been incorporated into the new Constitution just as it had been in the Articles of Confederation?⁸⁰ Why, they asked, was this important provision defining the relationship between the federal and state governments omitted from the new Constitution?⁸¹ Why was this vital relationship left to assumption and interpretation?⁸²

Antifederalists found Wilson's argument flawed by the prohibitions on the federal government incorporated in the Constitution itself.⁸³ Richard Henry Lee told Samuel Adams that every one of the constitutional restrictions on Congress "proves the Rule in Conventional ideas to be, that what was not reserved was given."⁸⁴ Thomas Jefferson, serving in Paris as U.S. minister to France, wrote James Madison that Wilson's theory was "a gratis dictum, opposed by strong inferences from the body of the instrument."⁸⁵ "Federal Farmer," the most influential Antifederal pamphleteer, asserted that the Constitution's ninth and tenth sections of Article I "are no more nor less, than a partial bill of rights."⁸⁶ These guarantees should be

75. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788) in 11 THE PAPERS OF JAMES MADISON, MARCH 7, 1788-MARCH 1, 1789 297 (Robert A. Rutland et al. eds., 1977) [hereinafter 11 MADISON PAPERS].

76. 1 SCHWARTZ, *supra* note 3, at 527.

77. JAMES WINTHROP, LETTERS OF AGRIPPA (1788), *reprinted in* 1 SCHWARTZ, *supra* note 3, at 510.

78. AN ESSAY BY "CINCINNATUS" I TO JAMES WILSON, ESQUIRE, *reprinted in* 13 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 24, at 529-33, (quoting from the November 1, 1787 edition of the *New York Journal*). Cincinnatus was Arthur Lee.

79. *Id.* at 531.

80. *Id.*

81. *Id.*

82. *Id.*

83. Letter from Richard Henry Lee to Samuel Adams (Oct. 27, 1787) *reprinted in* 13 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 24, at 484-85.

84. *Id.*

85. Letter from Thomas Jefferson to James Madison, (Dec. 20, 1787) in 11 MADISON PAPERS, *supra* note 75, at 336.

86. 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 45-46 (John P. Kaminski et al. eds., 1983) [hereinafter 14 DOCUMENTARY HISTORY OF THE

extended "as a part of this fundamental compact between the people of the United States and their federal rulers."⁸⁷

Federalists rarely defended Wilson with reasoned arguments. More commonly, they simply praised him and accepted the validity of his interpretation.⁸⁸ In Boston, "Remarker" maintained that "notwithstanding all that hath been said of it," the theory of reserved powers was "perfectly true."⁸⁹ The omission of a bill of rights "was wisdom itself, because it implies clearly that the people who are at once the *source* and *object* of power, are already in full possession of all the rights and privileges of freemen. Let the people retain them forever."⁹⁰

In attempting to explain why certain rights were explicitly protected in the Constitution while most others were not, James Madison admitted in *The Federalist* No. 44 that bills of attainder and ex post facto laws were already contrary to the social compact theory, principles of sound legislation, and some of the state bills of rights and constitutions.⁹¹ Nevertheless "additional fences against these dangers ought not to be omitted. Very properly therefore have the Convention added this constitutional bulwark in favor of personal security and private rights."⁹² Madison, however, did not explain why these rights but no others should be protected explicitly. Despite the reserved powers theory, the lack of a federal bill of rights remained the single most important obstacle to the ratification of the Constitution.

V. THE STATE RATIFYING CONVENTIONS

A. *Pennsylvania*

Pennsylvania was the first state to call and hold a ratifying convention. When the convention met on November 20, 1787, it was clear that two-thirds of the delegates supported the Constitution. Though the outcome was never in doubt, Federalists allowed their opponents almost a month in which to debate the Constitution.⁹³

RATIFICATION}.

87. 14 *id.*

88. See 1 SCHWARTZ, *supra* note 3, at 527-28.

89. BOSTON INDEPENDENT CHRON., Dec. 27, 1787.

90. *Id.*

91. PUBLIUS: THE FEDERALIST NO. 44, *reprinted in* 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 470-71 (John P. Kaminski et al. eds., 1984) [hereinafter 15 DOCUMENTARY HISTORY OF THE RATIFICATION].

92. 15 *id.* at 470.

93. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION

Throughout the debate, Federalists maintained that the Constitution had to be adopted *in toto* or rejected completely. The convention had no authority to propose amendments or ratify conditionally. The lack of a federal bill of rights, Federalists argued, presented no danger. Quite the contrary—a bill of rights would endanger liberties because all rights could not be enumerated. What would happen to those rights that were omitted? Would they be forfeited? James Wilson again led the Federalist argument.

A bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt an enumeration, everything that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government; and the rights of the people would be rendered incomplete.⁹⁴

Federalist Thomas McKean, Chief Justice of the Pennsylvania Supreme Court, argued that bills of rights originally protected the liberties of the people from all-powerful feudal kings.⁹⁵ Republics where the people, either directly or indirectly, elected all officeholders, had no need for a bill of rights.⁹⁶ Did the people, asked McKean, need a bill of rights to protect themselves from themselves?⁹⁷ No, he answered. If the people were dissatisfied with their government, they possessed the power to alter it; and the new Constitution provided a means of enacting amendments.⁹⁸ *The Federalist* No. 84, written by Alexander Hamilton, reiterated this argument.⁹⁹ Bills of rights, he declared "have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants."¹⁰⁰ In republics, the people surrender nothing and retain everything. "WE THE PEOPLE of the United States, to secure the blessings of liberty to ourselves and our posterity, do *ordain* and *establish* this constitution for the United States of America."¹⁰¹ Here, according to Hamilton, was "a better recognition of popular rights than volumes of those aphorisms which

322 (John P. Kaminski et al. eds., 1976) [hereinafter 2 DOCUMENTARY HISTORY OF THE RATIFICATION].

94. 2 *id.* at 386-87.

95. 2 *id.* at 388.

96. 2 *id.*

97. 2 *id.*

98. 2 *id.*

99. THE FEDERALIST No. 84, at 259-69 (Alexander Hamilton) (Roy P. Fairfield ed., 1981).

100. *Id.* at 262.

101. *Id.*

make the principal figure in several of our state bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government."¹⁰²

Antifederalists easily countered their opponents' arguments. Pointing to the General Welfare Clause and the Necessary and Proper Clause, Antifederalists showed that Congress possessed unlimited authority under the Constitution. If ever a dispute arose over whether Congress had overstepped its authority, the federal government, armed with the supremacy clause of the Constitution, would make the final decision.¹⁰³ How could the states or the people expect fair treatment when their federal rulers possessed all power and were to be the final arbiters in disputed cases?¹⁰⁴

By mid-December, most of the issues in contention had been debated thoroughly. Before taking the final roll call, however, Antifederalist Robert Whitehill submitted petitions from 750 inhabitants of Cumberland County praying that the Constitution not be adopted without a bill of rights.¹⁰⁵ On December 12, Whitehill presented a list of fifteen amendments to the Constitution in the form of a bill of rights.¹⁰⁶ The final amendment—a paraphrasing of the second article of the Articles of Confederation—specifically limited Congress to those powers expressly delegated to it in the Constitution.¹⁰⁷ Whitehill moved that the convention adjourn "to some remote day" to give the people time to consider the amendments and to coordinate Pennsylvania's actions with other states.¹⁰⁸ Federalists discarded Whitehill's amendments (refusing even to allow them on the official journals) and voted to ratify the Constitution by a vote of 46 to 23.¹⁰⁹ The minority published its objections, including Whitehill's bill of rights, in newspapers, broadsides, and pamphlets that were circulated throughout the country.¹¹⁰

102. *Id.*

103. See THE ADDRESS AND REASONS OF DISSENT OF THE MINORITY OF THE CONVENTION OF THE STATE OF PENNSYLVANIA TO THEIR CONSTITUENTS, reprinted in 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 667-68 (1971) [hereinafter 2 SCHWARTZ].

104. See, e.g., Cumberland County Petition to the Pa. Convention (Dec. 5, 1787) in 2 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 93, at 309-11.

105. 2 *id.*

106. 2 *id.* at 588-90; see also 2 SCHWARTZ, *supra* note 103, at 658.

107. 2 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 93, at 599.

108. 2 *id.*

109. 2 *id.* at 589-90.

110. 2 *id.* at 588.

B. *Delaware, New Jersey & Georgia*

While Pennsylvania's convention debated the Constitution, neighboring Delaware acted quickly. After only three hours of debate, the Delaware convention ratified the Constitution unanimously on December 7.¹¹¹ New Jersey and Georgia followed quickly on December 18 and January 2 (1788), respectively.¹¹² Connecticut's convention then ratifie

d by a two-thirds majority on January 9.¹¹³ Minor opposition to the Constitution surfaced in each of these last three states,¹¹⁴ but delegates felt that they had either to accept or reject the new form of government in its entirety; therefore, amendments were not proposed.¹¹⁵ The initial phase of the ratification process had been completed with five of the necessary nine states solidly supporting the new Constitution.

C. *Massachusetts*

Nationwide attention now focused on Massachusetts. As the second-largest state in the Union, a rejection by Massachusetts could spell defeat for the new charter. Federalists could not afford to falter.

The Massachusetts ratifying convention met on January 9, 1788.¹¹⁶ It soon became evident that a majority of the delegates were Antifederalists.¹¹⁷ Despite their best efforts, Federalists after three weeks of debate could not convince enough Antifederalists to join them in saving the Constitution. If a vote were taken, the Constitution would be defeated.¹¹⁸ This desperate situation called for desperate measures.¹¹⁹

Governor John Hancock had been elected president of the Massachusetts convention, but he had been unable to attend the sessions because of a severe attack of the gout.¹²⁰ When faced with difficult

111. 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 29 (John P. Kaminski et al. eds., 1978) [hereinafter 3 DOCUMENTARY HISTORY OF THE RATIFICATION].

112. 3 *id.*

113. 3 *id.*

114. 3 *id.* at 105 (Delaware), 194-95 (New Jersey), 210-11 (Georgia).

115. 3 *id.* at 140-41 (Delaware), 194-95 (New Jersey), 259-60 (Georgia).

116. 2 SCHWARTZ, *supra* note 103.

117. 2 *id.* at 674; *see also* 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 61 (John P. Kaminski et al. eds., 1986) [hereinafter 16 DOCUMENTARY HISTORY OF THE RATIFICATION].

118. 2 SCHWARTZ, *supra* note 103, at 674.

119. 2 *id.* at 674.

120. 16 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 117, at 62.

political decisions, the gout often plagued the governor.¹²¹ Many of Hancock's friends and enemies alike believed that he was testing the political winds before he made his appearance at the convention.¹²²

Only when Federalists realized that the Constitution faced certain defeat did they decide to approach Hancock, their erstwhile political enemy.¹²³ Federalist leaders asked Hancock to present nine amendments to the convention as his own.¹²⁴ The convention would ratify the Constitution unconditionally but would "enjoin it upon their representatives" in the first federal Congress "to exert all their influence" to get the proposed amendments adopted.¹²⁵ In return, Federalists promised Hancock that they would not challenge his gubernatorial candidacy in the spring and that they would support him as the first vice president of the United States.¹²⁶ Furthermore, if Virginia refused to ratify the Constitution, George Washington would be ineligible for the presidency. Hancock, Federalists suggested, would be the obvious replacement.¹²⁷

The Federalist bait was tempting. Hancock's gout improved enough to allow him to be carried into the convention where he proposed "his" amendments.¹²⁸ Convinced by Hancock and Samuel Adams, enough Antifederalists changed their vote to allow the convention to adopt the Constitution by the slim margin of 187 to 168.¹²⁹ Antifederalists hoped that, with the support of the remaining state conventions, appropriate safeguards would be proposed by Congress and adopted by the state legislatures as provided in Article V of the Constitution.¹³⁰

The immediate response from Federalists nationwide was relief. James Madison wrote George Washington that "The amendments are a blemish, but are in the least Offensive form."¹³¹ To George Nicholas, Madison averred that "the plan of Massts. is unquestionably the Ultimatum of the foederalists [sic]."¹³² Antifederalists such

121. 16 *id.*

122. 16 *id.*

123. 16 *id.*

124. 16 *id.*

125. 16 *id.* at 63.

126. 16 *id.* at 62.

127. 16 *id.*

128. 16 *id.* at 63.

129. 16 *id.* at 63-64.

130. 16 *id.* at 63.

131. Letter from James Madison to George Washington (Feb. 15, 1788) in 10 THE PAPERS OF JAMES MADISON, March 7, 1788-March 1, 1789, at 336 (Robert A. Rutland et al. eds., 1977).

132. Letter from James Madison to George Nicholas (Apr. 8, 1788) *reprinted in* 9

as Patrick Henry argued that Massachusetts had "put the cart before the horse."¹³³ After seeing the Massachusetts amendments, Thomas Jefferson changed his mind about the best procedure to follow in ratifying the Constitution.¹³⁴ Previously, Jefferson had wanted nine states to ratify the Constitution "in order to ensure what was good in it."¹³⁵ Then the remaining four states, by holding out, could force Congress to propose "the necessary amendments."¹³⁶ But Massachusetts' new ratification with recommendatory amendments seemed far preferable.¹³⁷ Six of the remaining seven states used this technique of ratifying the Constitution unconditionally while proposing recommendatory amendments.¹³⁸ Without this type of ratification, the Constitution never would have been adopted.¹³⁹

D. *Other States*

Maryland became the seventh state to ratify the Constitution in April, 1788,¹⁴⁰ and South Carolina the eighth a month later.¹⁴¹ One more state ratification was needed to adopt the Constitution. As the conventions of Virginia, New Hampshire, and New York began to meet in June, most people presumed that New Hampshire would follow Massachusetts' example, thus providing the ninth ratification.¹⁴² But even if nine states ratified and the Constitution were declared adopted, a viable Union would be unthinkable without New York and Virginia—two states where Antifederalism was strong and demand for a bill of rights was widespread.¹⁴³

E. *Virginia*

Most Virginians wanted the Confederation Congress strength-

THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 632 (John P. Kaminski et al. eds., 1990) [hereinafter 9 DOCUMENTARY HISTORY OF THE RATIFICATION].

133. PATRICK HENRY, ADDRESS TO THE VIRGINIA CONVENTION (June 9, 1788) in 1 VIRGINIA DEBATES, *supra* note 8, at 160.

134. 16 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 117, at 65.

135. Letter from Thomas Jefferson to Edward Carrington (may 27, 1788) in 16 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 117, at 65.

136. *Id.*

137. *Id.*; see also 2 SCHWARTZ, *supra* note 106, at 628.

138. 16 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 117, at 65.

139. See 16 *id.* at 67 (quoting Edward Carrington, "The decision of Massachusetts is perhaps the most important event that ever took place in America, as upon her in all probability depended the fate of the Constitution.").

140. 2 SCHWARTZ, *supra* note 103, at 729 (volume 2).

141. 2 *id.* at 739.

142. 2 *id.* at 758.

143. See generally 2 *id.* at 762.

ened, and thus there was a predilection to accept whatever the Constitutional Convention proposed.¹⁴⁴ Confidence in the Convention was bolstered when George Washington agreed to serve and when he was elected as its presiding officer.¹⁴⁵ But after reading the Constitution and listening to the public debate, many Virginians felt that the Convention delegates had gone too far.¹⁴⁶ Antifederalists demanded amendments that would clarify the federal-state relationship and guarantee the rights of individuals.¹⁴⁷ Most important, Virginia Antifederalists wanted amendments added to the Constitution before their state ratified.¹⁴⁸ As the state prepared to elect delegates to a ratifying convention, an "Impartial Examiner" asked his fellow Virginians if there was "no medium between want of power, and the possession of it in an unlimited degree? Between the imbecility" of the Articles of Confederation and "the sweeping jurisdiction" of the new Constitution?¹⁴⁹ Couldn't the federal government be given sufficient power over commerce and foreign affairs but leave the states competent to rule in the everyday concerns of people? Federal rulers had to be restrained in order to protect personal liberties.¹⁵⁰

When the Virginia convention assembled in Richmond on June 2, 1788, neither Federalists nor Antifederalists could confidently count on a majority.¹⁵¹ Federalists thought that they had elected a few more delegates than their opponents, but no one knew exactly how the fourteen delegates from the District of Kentucky would vote.¹⁵² "Though the Constitution technically went into operation upon ratification by New Hampshire (the ninth state to ratify), everyone knew that the new Union could scarcely prove effective without the adherence of Virginia, at the time the largest and most important state."¹⁵³ Virginians themselves agreed that the new government could not survive unless their state joined it.¹⁵⁴ For three

144. 9 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 132, at 632.

145. 9 *id.* at 898.

146. See 2 SCHWARTZ, *supra* note 103, at 762-63. Even some Federalists who had originally opposed amendments began to concede that "recommendatory alteration might be necessary." 2 *id.* at 762.

147. 2 *id.* at 762.

148. 2 *id.*

149. 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 463 (John P. Kaminski et al. eds., 1988) [hereinafter 8 DOCUMENTARY HISTORY OF THE RATIFICATION] (quoting the VIRGINIA INDEPENDENT CHRON., Mar. 5, 1788).

150. 8 *id.*

151. 9 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 132, at 897-98.

152. 9 *id.* at 897.

153. 2 SCHWARTZ, *supra* note 103, at 762.

154. 2 *id.*

weeks, Federalists and Antifederalists battled over every aspect of the Constitution. A bill of rights and liberty on the one hand stood against a viable union and the perpetuation of the principles of the American Revolution on the other.

Patrick Henry began the onslaught on the Constitution by asking what right the Constitutional Convention "had to say *We, the People*, instead of *We, the States*?"¹⁵⁵ States, he said, "are the characteristics, and the soul of a confederation. If the States be not the agents of this compact, it must be one great consolidated National Government. . . ."¹⁵⁶ Henry saw the new Constitution as a revolution in government "as radical as that which separated us from Great Britain."¹⁵⁷ He told the delegates that "our rights and privileges are endangered, and the sovereignty of the States [will] be relinquished The rights of conscience, trial by jury, liberty of the press, all of your immunities and franchises, all pretensions to human rights and privileges, are rendered insecure, if not lost, by this change."¹⁵⁸ Americans, he said, "were wandering on the great ocean of human affairs" with "no landmarks to guide us."¹⁵⁹ He warned his fellow delegates "to be extremely cautious, watchful, [and] jealous of your liberty; for instead of securing your rights, you may lose them forever. If a wrong step be now made, the Republic may be lost forever," for surely the new Constitution would "destroy the State Governments, and swallow the liberties of the people."¹⁶⁰

Federalists, however, saw "no quarrel between Government and liberty; the former is the shield and protector of the latter. The war is between Government and

licentiousness, faction, turbulence, and other violations of the rules of society; [established] to preserve liberty."¹⁶¹ "Experience and history" had taught that in forming governments, powers must be commensurate with the object. Too much power would "subject the people to the depravity of rulers."¹⁶² But because "there can be no

155. 9 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 132, at 930.

156. PATRICK HENRY, ADDRESS TO THE VIRGINIA CONVENTION (June 4, 1788), in 1 VIRGINIA DEBATES, *supra* note 8, at 36. This is also found in 9 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 132, at 929-31.

157. PATRICK HENRY, ADDRESS TO THE VIRGINIA CONVENTION (June 5, 1788), in 1 VIRGINIA DEBATES, *supra* note 8, at 56.

158. *Id.*

159. *Id.* at 37.

160. *Id.* at 36, 159.

161. EDMUND PENDLETON, ADDRESS TO THE VIRGINIA CONVENTION (June 5, 1788), reprinted in 9 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 132, at 945.

162. EDMUND RANDOLPH, ADDRESS TO THE VIRGINIA CONVENTION (June 6, 1788), reprinted in 9 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 144, at 950.

liberty without Government," it must be as dangerous to make powers too limited, as too great.¹⁶³ That powers once granted could one day be abused was in no way "a sufficient reason against conceding them" in the first place.¹⁶⁴

Henry, however, saw government as "no more than a choice among evils."¹⁶⁵ If the adoption of the new Constitution was viewed as "a little or a trifling evil," then the convention ought to adopt it; but, if "its adoption may entail misery on the free people of this country," Henry demanded a rejection.¹⁶⁶

Virginia Antifederalists argued that the lack of a federal bill of rights was the Constitution's most serious flaw. Through the reserved powers theory, Federalists argued that the Constitution created a federal government with only delegated powers. Congress could legislate only when the Constitution authorized it. The states retained all other powers.¹⁶⁷

Antifederalists argued, however, that the Constitution's general welfare clause, necessary and proper clause, and supremacy clause rendered state bills of rights useless in confrontations with the federal government. When the people of Virginia formed their own state constitution, they also adopted a Declaration of Rights. Virginians "would not trust their own citizens, who had a familiarity of interest with themselves."¹⁶⁸ And yet, under the new federal Constitution, Virginians would give up many of their rights to a far-off government controlled by a majority of Northerners totally unsympathetic to the South. George Mason wanted a clause added to the Constitution reserving to the states all powers not delegated to the federal government. Such a clause existed in the Articles of Confederation, even though the Articles provided for a far weaker general government. "Why not then have a similar clause in this Constitution?" "Unless this were done," Mason saw that "many valuable and important rights would be concluded to be given up by implication," and he saw no "distinction between rights relinquished by a positive grant, and lost by implication. Unless there were a Bill of

163. *Id.*

164. JAMES MADISON, ADDRESS TO THE VIRGINIA CONVENTION (June 6, 1788), reprinted in 9 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 132, at 989-90.

165. PATRICK HENRY, ADDRESS TO THE VIRGINIA CONVENTION, (June 7, 1788), reprinted in 9 *id.* at 1035.

166. *Id.*

167. *Id.*

168. GEORGE MASON, ADDRESS TO THE VIRGINIA CONVENTION (June 11, 1788), reprinted in 9 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 132, at 1157.

Rights, implication might swallow up all our rights."¹⁶⁹

Patrick Henry also supported a federal bill of rights. "A Bill of Rights," he said, "is a favourite thing with" Americans in general and Virginians in particular.¹⁷⁰ If the unlimited, undefined powers of Congress were unchecked by a bill of rights, Henry told the convention that the government of Virginia would be an absurdity.¹⁷¹ It would give up all its powers over taxation and the military to the general government "without check, limitation, or controul [sic]."¹⁷² Satirically, however, Henry assured the delegates that the people of Virginia would still have their Declaration of Rights, but it would check a

weakened, prostrated, enervated State Government! You have a Bill of Rights to defend you against the State Government, which is bereaved of all power; and yet you have none against Congress, though in full and exclusive possession of all power! You arm yourselves against the weak and defenceless, and expose yourself naked to the armed and powerful. Is not this a conduct of unexampled absurdity?¹⁷³

In response to an appeal from an Antifederal committee of New York City, an Antifederal committee of the Virginia convention, chaired by George Mason, wrote a letter on June 9 asking the New Yorkers to appoint a delegation from their convention to meet one from Virginia "to agree on the necessary Amendments" to the Constitution.¹⁷⁴ Communications were kept secret, and special couriers carried messages back and forth between New York City, Richmond, and Poughkeepsie, where the New York convention had met in mid-June.¹⁷⁵ Antifederalists in the New York convention wrote Virginians agreeing that amendments were needed to secure the rights and promote the "Happiness of every Citizen of the Union."¹⁷⁶ Antifederalists in the conventions exchanged preliminary lists of amend-

169. George Mason, Address to the Virginia Convention (June 16, 1788), in 3 DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA 33 [hereinafter 3 VIRGINIA DEBATES].

170. *Id.* at 36.

171. *Id.* at 35.

172. *Id.*

173. *Id.*

174. See 9 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 132, at 818-24.

175. 9 *id.* at 811-29.

176. Letter from Robert Yates to George Mason (June 21, 1788), *reprinted in* 9 *id.* at 825.

ments,¹⁷⁷ but the time to travel between Richmond and Poughkeepsie made serious efforts to coordinate their activities impossible.

Throughout the entire Virginia convention, Antifederalists opposed an unconditional ratification of the Constitution. Federalists pushed for ratification with recommendatory amendments. All of the delegates agreed that the Constitution was imperfect, but Federalists maintained that the new government should first be established before amendments were proposed and adopted.

Antifederalists objected to this appeal for future amendments. Patrick Henry, for one, could

never agree to the proposed plan without Amendments. We have our liberties and privileges in our own hands. Let us not relinquish them. Let us not adopt this system till we see them secured. There is some small possibility, that should we follow the conduct of Massachusetts, amendments might be obtained. There is small possibility of amending any Government; but . . . shall we abandon our most inestimable rights, and rest their security on a mere possibility?¹⁷⁸

Henry later asked the delegates whether their rage for novelty was

so great, that you are first to sign and seal, and then to retract? Is it possible to conceive a greater solecism? . . . You agree to bind yourselves hand and foot—For the sake of what?—Of being unbound. You go into a dungeon—For what? To get out. Is there no danger when you go in, that the bolts of federal authority shall shut you in?¹⁷⁹

Henry urged the convention to adopt the Constitution conditionally with amendments. Federalists responded by suggesting that “previous amendments are but another name for rejection. They will throw Virginia out of the Union.”¹⁸⁰ Governor Edmund Randolph asked his fellow delegates to consider the issue carefully. Eight other states had adopted the Constitution expecting amendments to follow. Was it not better “to adopt and run the chance of amending it hereafter, than run the risk of endangering the Union?”¹⁸¹ The Confederation, he argued, was dead. If the Constitution were rejected, the Union would be dissolved, and “the dogs of war would break loose,

177. 9 *id.*

178. PATRICK HENRY, ADDRESS TO THE VIRGINIA CONVENTION (June 7, 1788), reprinted in 9 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 132, at 1036-37.

179. *Id.* at 1070.

180. 3 VIRGINIA DEBATES, *supra* note 169, at 170.

181. 3 *id.*

and anarchy and discord would complete the ruin of this country."¹⁸² Ratification with recommendatory amendments would prevent this catastrophe, while the unison of sentiments among the adopting states would assure the adoption of subsequent amendments.¹⁸³ The issue was plain. Would the thirteen states "[u]nite freely, peaceably, and unanimously, for the security of their common happiness and liberty," or would everything "be put in confusion and disorder?"¹⁸⁴

On June 25, after three weeks of intense debate, the convention decided the issue.¹⁸⁵ Antifederalists presented a list of amendments proposing both guarantees for individual liberties and alterations in the structure and nature of the federal government.¹⁸⁶ By a vote of 88 to 80, delegates defeated these amendments.¹⁸⁷ Then, by a vote of 89 to 79, the convention unconditionally adopted the Constitution.¹⁸⁸ During the next two days, a committee drafted and then the convention agreed to recommendatory amendments to the Constitution.¹⁸⁹ Virginians would trust the first federal Congress to propose necessary amendments that would protect basic human rights and guarantee the powers of the states.¹⁹⁰

F. *New York*

While the evenly divided Virginia convention debated the Constitution, New York delegates met in Poughkeepsie on June 17.¹⁹¹ More than two-thirds of the delegates opposed the unconditional ratification of the Constitution.¹⁹² New York Antifederalists opposed the Constitution for many of the same reasons espoused elsewhere.¹⁹³ New York's opposition also derived, in large part, from the state's peculiar geography. Blessed with an excellent harbor and navigable rivers, the state was able to levy a tariff on imports that freed its landholders from real estate taxes.¹⁹⁴ Since most of the foreign goods

182. 3 *id.* at 171.

183. 3 *id.* at 183.

184. 3 *id.*

185. 9 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 132, at 898, 899.

186. 9 *id.* at 899.

187. 9 *id.*

188. 9 *id.*

189. 9 *id.* at 900.

190. 9 *id.*

191. 2 SCHWARTZ, *supra* note 106, at 852.

192. JOHN P. KAMINSKI, GEORGE CLINTON: YEOMAN POLITICIAN OF THE NEW REPUBLIC 89-96 (1993).

193. *Id.*

194. *Id.*

consume

d in Connecticut and New Jersey were first imported into and taxed by New York, residents of these two states grudgingly paid large sums annually into New York's treasury.¹⁹⁵ New York Antifederalists thus saw the new Constitution, which gave Congress alone the power to tax foreign imports, as a threat to the economic development of their state.¹⁹⁶ State Senator John Williams of Washington County expressed these reservations to his constituents. If the Constitution were adopted, "the advantage of having property in a maritime state will be reduced to an equal value with the property where there is no navigation. If this is not taking our liberty, it is certainly diminishing our property, which is equal to it."¹⁹⁷ According to Williams, taxes had remained low in New York because of the revenue from the state impost.

This is a privilege Providence hath endowed us with. . . . Let our imposts and advantages be taken from us, shall we not be obliged to lay as heavy taxes as Connecticut, Boston, &c. What hath kept us from those burthens but the privileges, which we must lose if the present proposed Constitution is adopted.¹⁹⁸

New York Antifederalists also worried about the Constitution's failure to protect their basic rights. Newspapers, broadsides, and pamphlets were filled with articles that stressed the need for a bill of rights.¹⁹⁹

With a two-thirds majority of delegates, New York Antifederalists bided their time. They agreed to debate each section of the Constitution with the proviso that amendments be proposed and discussed simultaneously.²⁰⁰ One week after assembling, word arrived that New Hampshire had ratified the Constitution, thus satisfying the nine-state requirement for adopting the new form of government. Another week brought news of Virginia's ratification. New York Federalists were buoyed. The Antifederal bloc, although outwardly unaffected, began to lose its cohesiveness as a variety of conditional

195. *Id.*

196. *Id.*

197. JOHN WILLIAMS, REPORT TO CONSTITUENTS (1788), reprinted in 16 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 117, at 200 (quoting ALBANY FEDERAL HERALD, Feb. 25, 1788) (the letter was reprinted four times in New York and once each in New Jersey, Pennsylvania, and Maryland).

198. *Id.*

199. John P. Kaminski, New York: The Reluctant Pillar, in THE RELUCTANT PILLAR: NEW YORK AND THE ADOPTION OF THE FEDERAL CONSTITUTION 67-68 (Stephen L. Schechter ed., 1985).

200. *Id.* at 100-04.

ratification plans were suggested.²⁰¹

On July 2, Thomas Tredwell of Suffolk County eloquently stated the case for a bill of rights—the rock on which the Constitution should have rested. “No other foundation can any man lay, which will secure the sacred temple of freedom against the power of the great, the undermining arts of ambition, and the blasts of profane scoffers.”²⁰² Be wary, Tredwell warned, of those who “tend to corrupt our political faith, to take us off our guard, and lull to sleep that jealousy which, we are told by all writers,—and it is proved by all experience,—is essentially necessary for the preservation of freedom.”²⁰³ Tredwell felt that Americans had “departed widely from the principles and political faith of ‘76, when the spirit of liberty ran high.”²⁰⁴ The new Constitution provided “no security for the rights of individuals, no security for the existence of our state governments; here is no bill of rights, no proper restriction of power; our lives, our property, and our consciences, are left wholly at the mercy of the legislature, and the powers of the judiciary may be extended to any degree short of almighty.”²⁰⁵ Tredwell lamented that

in this Constitution we have not only neglected,—we have done worse,—we have openly violated, our faith,—that is, our public faith. . . . The liberties of the country are a deposit, a trust, in the hands of individuals; . . . which the possessors have no right to dispose of; they belong to our children, and to them we are bound to transmit them.²⁰⁶

On July 7, John Lansing, Jr., one of the Antifederal leaders in the convention and a former delegate to the Constitutional Convention, read a bill of rights that was “to be prefixed to the constitution.”²⁰⁷ During the next two days, Antifederalists caucused to try to arrive at some consensus. On July 10, Lansing presented the Antifederalists’ proposal.²⁰⁸ Three kinds of amendments were suggested: (1) explanatory, (2) conditional, and (3) recommendatory.²⁰⁹ The first group of amendments included a bill of rights and some expla-

201. *Id.* at 105-07.

202. THOMAS TREDWELL, ADDRESS TO THE NEW YORK CONVENTION (July 2, 1788), reprinted in 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 399 (2nd ed. rev., Phil., 1836-1845).

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 399, 401, 404.

207. Kaminski, *supra* note 199, at 48, 107-08.

208. *Id.*

209. *Id.*

nations of unclear portions of the Constitution.²¹⁰ The conditional amendments prohibited Congress from exercising certain military, fiscal, and regulatory powers until after a second constitutional convention had considered these matters.²¹¹ The recommendatory amendments were "numerous and important" and should be considered by the first federal Congress.²¹²

Federalists denounced the plan as "a gilded Rejection"; Antifederalists said that it was their "*Ultimatum*."²¹³ As debate continued, Antifederalist solidarity diminished. On July 17, Melancton Smith, the self-proclaimed Antifederal manager of the convention, proposed that the convention declare the Constitution defective, but that it join the other ten ratifying states.²¹⁴ New York, however, should retain the option to withdraw from the Union if Congress refused to call a second constitutional convention within four years to consider amendments.²¹⁵ On July 19, Smith removed his proposal when it failed to win support from either Federalists or Antifederalists.²¹⁶

From July 19 to 23, the delegates considered a new plan for conditional ratification.²¹⁷ The proposal called for the Constitution to be ratified "upon condition" that certain amendments, including a bill of rights, be accepted. On the 23rd, Samuel Jones of Queens moved that the words "upon condition" be dropped in favor of "in full confidence."²¹⁸ Still convinced of the necessity of amendments, Melancton Smith supported the change because, after Virginia's ratification, the most "practicable way" to obtain amendments "was only in the mode prescribed by the Constitution."²¹⁹ Antifederalist leaders agreed that conditional ratification would only keep New York out of the Union, thus diluting support for amendments in the first federal Congress. Without New York in the first Congress, a bill of rights would be unlikely.²²⁰

210. *Id.*

211. *Id.*

212. *Id.*

213. Abraham Bancker to Evert Bancker (July 12, 1788) (letter available in the Bancker Family Correspondence, The New-York Historical Society); DeWitt Clinton to Charles Tillinghast (July 12, 1788) (letter available in the DeWitt Clinton Papers, Columbia University Library).

214. Kaminski, *supra* note 199, at 108-09.

215. *Id.*

216. *Id.*

217. *Copy of a Letter from Poughkeepsie, dated Friday, July 25, 1788*, N.Y. INDEPENDENT JOURNAL (July 28, 1788) (supplement extraordinary).

218. *Id.*

219. *Id.*

220. Kaminski, *supra* note 199, at 108-09.

These arguments convinced enough Antifederalists to join Federalists in a vote of 31 to 29 to approve Jones's motion.²²¹ A final effort to obtain a limited-term ratification failed on July 24, and the next day an Antifederalist motion for adjournment was defeated 31 to 28. On July 26, by a vote of 30 to 27, the convention ratified the Constitution with recommendatory amendments—a bill of rights and a list of structural changes to the Constitution.²²² The convention then adopted a circular letter to the states recommending the calling of a second constitutional convention to deal with the amendments proposed by the different states.²²³ Circumstances outside the state—ratification by ten of the other twelve states—had convinced New York Antifederalists that they had to work within the first federal Congress to obtain the necessary safeguards to protect their liberties.²²⁴

V. AMENDING THE CONSTITUTION

A. *Meeting Of The First Congress*

Once the Constitution was ratified by nine states, the contest to elect the first federal representatives and senators began. On September 13, 1788, the Confederation Congress adopted an election ordinance.²²⁵ Six months later, the first federal Congress met in New York City.²²⁶ The debate that took place during the elections of the first Congress was, in essence, a continuation of the ratification debate. Local issues and conflicting personalities played their usual roles in every state, but the key issue in Pennsylvania, Massachusetts, Virginia, and New York continued to be amendments to the Constitution.²²⁷ What kind of amendments would be proposed and how would they be proposed? Would a bill of rights be proposed or would far-ranging structural amendments also be put forth that, if adopted, would change the nature of the new Constitution? Would Congress propose the amendments or would another constitutional convention be called? No one knew the answers to these questions, but some Antifederalists pictured "the first Congress as a second

221. 2 SCHWARTZ, *supra* note 103, at 854.

222. 2 *id.* at 854.

223. 2 *id.* at 854-55.

224. *See generally* 2 *id.* at 854.

225. John P. Kaminski, *The Constitution without a Bill of Rights, in THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES* 39 (Patrick T. Conley & John P. Kaminski eds., 1992).

226. *Id.*

227. *Id.*

Convention.”²²⁸ Therefore, the men elected to serve in this first Congress would play a critical role in shaping the new Constitution.

Although called to convene on March 4, 1789, the new Congress under the Constitution did not attain a quorum until the first week of April.²²⁹ In his inaugural address on April 30, President George Washington

n urged that “a reverence for the characteristic rights of freemen, and a regard for the public harmony” should encourage Congress to consider possible amendments to the Constitution.²³⁰ Instead of proposing specific amendments, however, Washington hoped that Congress would “carefully avoid every alteration which might endanger the benefits of an United and effective Government, or which ought to await the future lessons of experience.”²³¹

B. *Madison's Call For Amendments*

Federalists worried that the states might require Congress to call a second general convention to amend the Constitution.²³² Such a convention, proposed by New York's ratifying convention, would be unrestricted in what it could propose. Perhaps, in fact, an entirely new constitution might be recommended, as was done by the Constitutional Convention in 1787. This fear intensified when the legislatures of Virginia on November 20, 1788, and New York on February 7, 1789, adopted resolutions to be laid before the new Congress calling for another general convention.²³³

On May 4, 1789, Representative James Madison announced his intention to introduce amendments to the Constitution later in the month.²³⁴ The next day, Madison's Virginia colleague, Theodorick Bland, presented to the House of Representatives his state's call for a second general convention.²³⁵ According to the petition, the people of Virginia and of the other states believed that the Constitu-

228. Letter from Samuel Osgood to Elbridge Gerry (Feb. 13, 1789) (original available in *THE GERRY PAPERS*, Library of Congress).

229. *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS* xiv (Helen E. Veit et al. eds., 1991) [hereinafter *CREATING THE BILL OF RIGHTS*].

230. *THE PAPERS OF GEORGE WASHINGTON* (W.W. Abbot et al. eds., 1987), *reprinted in* 2 *PRESIDENTIAL SERIES* 176 (Dorothy Twohig ed.).

231. *Id.*

232. BERNARD SCHWARTZ, 5 *ROOTS OF THE BILL OF RIGHTS* 1006 (1971).

233. 5 *id.*

234. 5 *id.* All of the congressional debate over the proposed amendments is found in this text.

235. 5 *id.*

tion endangered "all the great and unalienable rights of freemen."²³⁶ Objections to the Constitution "were not founded in speculative theory, but [were] deduced from principles which have been established by the melancholy example of other nations in different ages."²³⁷ Expected to be busy in establishing the new government, Congress would surely act slowly in making recommendations for amendments. Thus, Virginia felt obliged to have Congress call a second constitutional convention. New York echoed Virginia's request when on May 6 Representative Nathaniel Lawrence presented his state's request for another convention. The House accepted the petitions, declaring that only if it should receive eight such petitions (two-thirds of the eleven states that had ratified the Constitution) would the issue of a second convention properly be considered by the House.²³⁸

On Monday June 8, 1789, fulfilling the wishes of Virginia's convention and his election promise to his constituents, and also trying to defuse the Antifederalists' attempt to call a second constitutional convention, Madison asked the House of Representatives to go into a committee of the whole to consider amendments to the Constitution.²³⁹ Fearing an open debate on the floor of Congress under the watchful eyes of a crowded gallery, opponents of the measure suggested that the House either choose a select committee to consider amendments or that Madison propose his amendments, have them printed and distributed to the members, and then assign a date for later discussion.²⁴⁰ An immediate consideration of amendments, they contended, appeared to be "premature"; more important matters in setting up the government should first be considered.²⁴¹ Even representatives who supported amendments felt that the appropriate time had not yet arrived to consider the subject. Madison reluctantly agreed that it was inopportune for Congress to consider amendments immediately,²⁴² but he presented his amendments so that they could be submitted to a committee for later debate.²⁴³ However, Madison advised his fellow representatives that "prudence" dictated that, before the end of its first session, Congress submit amendments to

236. 5 *id.*

237. 5 *id.*

238. 5 *id.*

239. 5 *id.* at 1017.

240. 5 *id.*

241. 5 *id.*

242. 5 *id.* at 1019-20.

243. 5 *id.* at 1026-28.

the state legislatures.²⁴⁴

Madison told the House that he believed that many Americans were "dissatisfied" with the Constitution.²⁴⁵ "On the principles of amity and moderation," he explained, he wished to protect expressly "the great rights of mankind" under the Constitution.²⁴⁶ Such an act might also convince North Carolina and Rhode Island to join the Union.²⁴⁷ Above all, however, Madison believed that all power is subject to abuse; therefore, it would be proper to guard more adequately against this potential danger.²⁴⁸ He agreed that the door should not be opened to "a reconsideration of the whole structure of the Government," but insisted that a consideration of "the security of rights" posed no danger to the new federal government.²⁴⁹

According to Madison a majority of Antifederalists opposed the Constitution because they feared the government's "encroachments on particular rights," especially in those areas where Americans had become accustomed to "safeguards . . . interposed between them and the magistrate who exercises the sovereign power."²⁵⁰ To satisfy these apprehensions, Madison proposed a number of amendments to the Constitution which, taken, together made up a bill of rights.²⁵¹ Stating that he never believed that a bill of rights was so essential that the Constitution should be rejected until one was added,²⁵² Madison stressed that his amendments would not affect "the structure and stamina of the government" but would be "important in the eyes of many" as the protection they had sought during the ratification debate.²⁵³ Amendments protecting fundamental rights would prove that Federalists were "sincerely devoted to liberty and a republican government."²⁵⁴ And, while it was true that bills of rights in Great Britain "have gone no farther than to raise a barrier against the power of the Crown" while the power of the legislature is left unchecked, in America the people "have thought it necessary to raise barriers against power in all forms and departments of Gov-

244. 5 *id.* at 1024.

245. 5 *id.*

246. 5 *id.*

247. 5 *id.* at 1024-25.

248. 5 *id.* at 1025.

249. 5 *id.*

250. 5 *id.*

251. 5 *id.* at 1026-28.

252. 5 *id.* at 1028.

253. 5 *id.* at 1024.

254. 5 *id.*

ernment."²⁵⁵ The great object in Madison's view was "to limit and qualify the powers of Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode."²⁵⁶

C. *Antifederalist Opposition To Madison*

Many Americans opposed Madison's amendments as unnecessary. Noah Webster attacked Madison's proposal: "It seems to be agreed on all hands that paper declarations of rights are trifling things and no real security to liberty."²⁵⁷ But Madison believed that paper declarations would "have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community."²⁵⁸

Ardent Antifederalists throughout the country who had advocated both a bill of rights and significant structural changes to the Constitution denounced Madison's amendments. George Mason characterized Madison as a supporter of "Milk & Water Propositions" that would serve as "a Tub to the Whale," that is, a diversion from significant alterations.²⁵⁹ Other Virginians viewed the amendments "as an anodyne to the discontented" or "as a soporific draught to the restless."²⁶⁰ South Carolina Antifederalist Aedanus Burke condemned the amendments in Congress as "frothy and full of wind, formed only to please the palate."²⁶¹ Representative George Clymer of Pennsylvania likened Madison to "a sensible physician [who] has given his malades imaginaries bread pills powder of paste &c neutral mixtures to keep them in play."²⁶²

Ironically, Madison now answered all those arguments against bills of rights previously put forth by Federalists during the ratification debate. Over and over again, Madison said that Federalist dis-

255. 5 *id.* at 1029.

256. 5 *id.*

257. Noah Webster (writing as *A Free Mechanic*), N.Y. JOURNAL (Aug. 20, 1789), quoted in Kaminski, *supra* note 225, at 47).

258. 5 ROOTS OF THE BILL OF RIGHTS, *supra* note 232, at 1030.

259. Letter from George Mason to John Mason (July 31, 1789), in 12 THE PAPERS OF JAMES MADISON, MARCH 7, 1788-MARCH 1, 1789, at 1164 (Robert A. Rutland et al. eds., 1977) [hereinafter 12 MADISON PAPERS].

260. Letter from Edmund Randolph to James Madison (June 30, 1789), in 12 MADISON PAPERS, *supra* note 259, at 273.

261. Kenneth R. Bowling, "A Tub to the Whale": *The Founding Fathers and Adoption of the Federal Bill of Rights*, 8 J. EARLY REPUBLIC 239, 241 (1988).

262. Letter from George Clymer to Tench Coxe (June 28, 1789) (original located Coxe Papers, Tench Coxe Section, Historical Society of Pennsylvania), quoted in CREATING THE BILL OF RIGHTS, *supra* note 229, at 255.

claimers against a bill of rights were inconclusive.²⁶³ Furthermore, he averred that a bill of rights incorporated into a constitution would empower the independent judicial tribunals to consider themselves "in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive."²⁶⁴

Congress divided, sometimes bitterly, over Madison's amendments. Representative James Jackson of Georgia dismissed them as "theoretical speculation." If "not dangerous or improper," Madison's amendments were "at least unnecessary."²⁶⁵ Representative Elbridge Gerry, on the other hand, felt that it would be "improper" to consider Madison's few amendments when there were many other substantial amendments proposed by the state conventions.²⁶⁶ Antifederalists would lose faith in Congress, Gerry maintained, if only Madison's amendments were considered. On some occasions, Gerry later reported, the intensity of the debate reached the point where congressmen were ready to settle their disagreements with dueling pistols,²⁶⁷ but cooler heads prevailed. The debate on June 8 ended when Congress agreed that Madison's amendments should at some future date be considered in the committee of the whole.²⁶⁸

D. *Further Debate Over Madison's Amendments*

Six weeks later, on July 21, Madison again asked the House to consider his amendments.²⁶⁹ The House voted to send Madison's amendments and all of the other amendments submitted by state ratifying conventions to a select committee composed of one member from each state.²⁷⁰ On July 28, the committee reported a list of seventeen amendments—basically a composite of Madison's amendments—which was ordered to lie on the table.²⁷¹ On August 3, Madison again urged the House to take up the amendments, and it

263. 5 ROOTS OF THE BILL OF RIGHTS, *supra* note 232, at 1030-32.

264. 5 *id.* at 1031.

265. 5 *id.* at 1034.

266. Letter from Elbridge Gerry to Samuel R. Gerry (June 30, 1790) (original located at Samuel Russel Gerry Papers, Massachusetts Historical Society); *see also* 5 ROOTS OF THE BILL OF RIGHTS, *supra* note 232, at 1036-37.

267. 5 ROOTS OF THE BILL OF RIGHTS, *supra* note 232, at 1036-37.

268. 5 *id.* at 1042.

269. 5 *id.* at 1050.

270. 5 *id.*

271. 5 *id.*

was agreed to discuss the committee's report on August 12.²⁷² Other business occupied the House on the 12th, and thus the discussion was postponed.²⁷³ On the 13th, a lengthy debate occurred on the propriety of considering amendments when other more pressing matters awaited the House's consideration.²⁷⁴ Madison saw the real danger that amendments would not be proposed during this first session of Congress.²⁷⁵ He pleaded with the House not to let the amendments die. The House voted to accede to Madison's wishes, and between August 13 and 24 the amendments were debated first in a committee of the whole and then, after August 18, in the House itself.²⁷⁶

At times during this debate, Madison's amendments appeared to be dead because they did not have the support of the necessary two-thirds majority required by Article V of the Constitution.²⁷⁷ Madison thus asked President Washington for support. Washington responded by stating that some of the amendments were "importantly necessary" while others, though not essential in his judgment, would be "necessary to quiet the fears of some respectable characters and well meaning Men. Upon the whole, therefore, not foreseeing any evil consequences that can result from their adoption, they have my wishes for a favorable reception in both houses."²⁷⁸ With Washington's support, the amendments won approval by the House of Representatives.

One important decision that some representatives at the time thought "trifling" was the matter of form.²⁷⁹ How would amendments be added to the Constitution? Would they be placed at the end of the original document or would they be interspersed throughout, deleting passages of the original Constitution that were no longer applicable and altering others? In a lengthy debate on August 13, 1789, Madison urged the latter, arguing that "there is a neatness and propriety in incorporating the amendments into the constitution itself."²⁸⁰ The Constitution, he argued, would "certainly be more simple, when the amendments are interwoven into those parts to

272. 5 *id.*

273. 5 *id.*

274. See generally 5 *id.* at 1062-66.

275. 5 *id.* at 1065.

276. 5 *id.* at 1050.

277. 5 *id.*

278. Letter from George Washington to James Madison (n.d.), in 12 MADISON PAPERS, *supra* note 259, at 191.

279. See generally 5 ROOTS OF THE BILL OF RIGHTS, *supra* note 232, at 1066-75.

280. 5 *id.* at 1066.

which they naturally belong, than it will if they consist of separate and distinct parts."²⁸¹ Roger Sherman of Connecticut opposed this interweaving, arguing that "We might as well endeavor to mix brass, iron, and clay, as to incorporate such heterogeneous articles."²⁸² James Jackson supported Sherman's position, urging "that the original constitution ought to remain inviolate, and not be patched up, from time to time, with various stuffs resembling Joseph's coat of many colors."²⁸³ On August 13, Madison's arrangement was approved, only to be overturned by a two-thirds vote six days later.²⁸⁴

E. *The Senate's Version Of The Amendments*

On August 24, 1789, the Senate received the seventeen proposed amendments from the House of Representatives.²⁸⁵ The Senate read the amendments on the 25th, when Ralph Izard of South Carolina, John Langdon of New Hampshire, and Robert Morris of Pennsylvania treated them "contemptuously."²⁸⁶ Izard and Langdon unsuccessfully moved to postpone their consideration to the next session, and on September 2 the Senate began its consideration of the amendments.²⁸⁷ Within three weeks, the Senate had tightened the language and consolidated the amendments into a list of twelve, which the Senate then approved.²⁸⁸ Significantly, the Senate eliminated what Madison considered "the most valuable amendment in the whole lot" when it struck out the prohibition on the states from infringing on the freedom of conscience, speech, press, and jury trial.²⁸⁹ Over forty years later, this omission was invoked by Chief Justice John Marshall in the U.S. Supreme Court's decision in *Barron v. Baltimore*²⁹⁰ in which the Bill of Rights was declared applicable only to the federal government, not to the states.²⁹¹ After rejecting a host of amendments based on the Virginia ratifying convention's recommendations, the Senate adopted its version of amendments on September

281. 5 *id.* at 1006.

282. 5 *id.* at 1066.

283. 5 *id.* at 1072.

284. 5 *id.* at 1051.

285. 5 *id.* at 1145.

286. 5 *id.*

287. 5 *id.*

288. 5 *id.* at 1147.

289. 5 *id.* at 1145-46.

290. *Barron v. Baltimore*, 32 U.S. 243 (1833).

291. *Id.* at 248.

9, 1789.²⁹²

F. *Congress Accepts the Amendments*

The House of Representatives received the Senate's amendments on September 10.²⁹³ It agreed to some of the Senate's changes, and on September 21, called a conference committee to settle the differences.²⁹⁴ The committee—composed of Madison, Sherman, and John Vining of Delaware from the House, and Oliver Ellsworth (Connecticut), Charles Carroll (Maryland), and William Paterson (New Jersey) from the Senate—reported to the House of Representatives on September 23.²⁹⁵ The following day the House accepted the committee's report (in which the Senate withdrew those changes not approved by the House) by a vote of 37 to 14, and passed a resolution requesting President Washington to transmit copies of the proposed amendments to the eleven states in the Union as well as to North Carolina and Rhode Island.²⁹⁶ On September 25, the Senate concurred with the House.²⁹⁷ Congress had complied with the provisions of Article V of the Constitution in recommending amendments to the state legislatures. It had acted to satisfy the apprehensions raised by Antifederalists throughout the ratification debate.²⁹⁸

G. *State Debates Over The Proposed Amendments*

On October 2, 1789, President Washington sent the twelve amendments to the states for their approval.²⁹⁹ Several state legislatures rejected the first two amendments which provided a formula for the apportionment of the House of Representatives and for a restriction on the power of congressmen to enact salary increases for themselves.³⁰⁰ It took over two years for the other ten amendments—the future Bill of Rights—to be adopted by the necessary three-fourths of the state legislatures.³⁰¹ Much of the delay was due to Virginia's reluctance.³⁰²

292. 5 THE ROOTS OF THE BILL OF RIGHTS, *supra* note 232, at 1147.

293. 5 *id.* at 1159.

294. 5 *id.*

295. 5 *id.*

296. 5 *id.*

297. 5 *id.*

298. 5 *id.*

299. 5 *id.* at 1171.

300. 5 *id.*; *see also* 5 *id.* at 1203. The author provides a breakdown of the individual amendments postponed or rejected by each state.

301. 5 *id.* at 1171.

302. 5 *id.* The author notes that Virginia temporarily rejected the amendments.

The states adopted the Bill of Rights as follows:

<i>State</i>	<i>Date of Adoption</i>
New Jersey	November 20, 1789
Maryland	December 19, 1789
North Carolina	December 22, 1789
South Carolina	January 19, 1790
New Hampshire	January 25, 1790
Delaware	January 28, 1790
New York	February 27, 1790
Pennsylvania	March 10, 1790
Rhode Island	June 11, 1790
Vermont	November 3, 1791
Virginia	December 15, 1791 ³⁰³

Since the proposed amendments to the Constitution were discussed in state legislatures in committees of the whole (and these debates are not recorded), little is known about these debates.³⁰⁴ At first, nine states were needed to adopt the amendments. After both North Carolina and Rhode Island joined the Union, ten state adoptions became necessary to approve a constitutional amendment. But, when Vermont entered the Union, becoming the fourteenth state in 1791, eleven states were needed to obtain the necessary three-fourths approval.³⁰⁵

Massachusetts, Connecticut, and Georgia each failed to ratify the amendments.³⁰⁶ A joint committee of the Georgia legislature reported on December 1, 1789, that it was premature to consider amendments—only “experience” would “point out” “the defective parts of the Constitution.”³⁰⁷

In Connecticut the assembly rejected the first and second amendments, but approved the remaining ten. The council (the state legislature’s upper house) approved all twelve. A conference committee reported a bill containing approval of all twelve amendments, which the assembly rejected preferring to “adhere to their former vote.”³⁰⁸

303. See 13 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 24, at xxvi-xxviii.

304. 5 ROOTS OF THE BILL OF RIGHTS, *supra* note 232, at 1171.

305. 5 *id.* at 1202.

306. 5 *id.* at 1203.

307. Kenneth Coleman, *Frontier Haven: Georgia and the Bill of Rights*, in THE BILL OF RIGHTS AND THE STATES, *supra* note 225, at 457.

308. Christopher Collier, *Liberty, Justice, and No Bill of Rights: Protecting Natural Rights in a Common-Law Commonwealth*, in THE BILL OF RIGHTS AND THE STATES, *supra*

1. *Massachusetts' Debate*

Governor John Hancock of Massachusetts transmitted the proposed amendments to the legislature on January 14, 1790.³⁰⁹ Five days later, after requesting permission, Hancock personally addressed the legislature. The approval of the amendments was "very important" because the people of Massachusetts felt assured by their state ratifying convention "that certain amendments would be adopted."³¹⁰ Some of the amendments, Hancock declared, would "afford security to the best rights of men in civil society," while others were "very important to that personal security, which is so truly characteristic of a Free Government."³¹¹ Responding to the governor's message, the legislature promised to consider the amendments carefully because they were "anxious that the Whole Body of the People should have the fullest Confidence, that their Rights, & Liberties are secured to them in the general Government by the most explicit declarations, which will have a tendency to give energy to its Authority & Laws."³¹²

On January 29, 1790, the Massachusetts Senate approved the last ten proposed amendments to the Constitution and appointed a committee to consider other amendments. Four days later the House of Representatives rejected amendments one, two, and twelve, but adopted the other nine amendments.³¹³ The House also appointed members to the joint committee created by the Senate to consider additional amendments.³¹⁴ A month later the committee, led by Anti-federalists Nathan Dane and Benjamin Austin, reported that "further Amendments in that Constitution are necessary to secure the Liberties of the People, and the blessings of a free and efficient system of Government; and that such Amendments ought now to be attended to, and made so particular, as will have a tendency to preserve the forms of a Federal Republic, and to prevent a consolidation of the States."³¹⁵ The committee recommended that the legislature "suggest . . . several principles of Amendments" to its congressional delegation to be "attended to, as soon as the important business now

note 225, at 120-21.

309. Misc. Legislative Papers, House Folder #3352, Mass. Archives (1790).

310. *Id.*

311. *Id.*

312. *Id.* at Senate File #1140-41.

313. *Id.* at Senate File #1145.

314. Massachusetts House of Representatives Journal at x; 209, Mass. Archives.

315. Broadside Committee Report (American Bibliography #22655), *reprinted in BOSTON INDEPENDENT CHRON.* (Supp.) (Mar. 4, 1790).

before Congress, will admit.”³¹⁶

The committee believed that much was needed “to define and complete the System.” Committee members sought “Amendments, from what they conceive[d] to be the fundamental principles of a free and energetic System of Government for an extensive Community.” After examining the Constitution, the committee concluded “that the powers of the general Government, in several instances, are not well defined or limited; that there is not a just line of distinction drawn between them, and the powers of the local Governments.”³¹⁷

In concluding its report, the committee recommended twelve additional amendments to the Constitution: Congress should neither establish commercial monopolies nor interfere in federal elections, unless a state failed to provide for an election; republican forms of government should be guaranteed to the territories of the United States; Congress should use the regular civil authorities—not the military—to enforce compliance with its laws, and the states should have a veto power over peacetime military policy; the federal government should exercise no power that was not “expressly delegated” in the Constitution, and certain tax sources ought to be specifically reserved for the states, except “as war and other extraordinary exigencies may require;” the federal judiciary should “be more explicitly defined,” with jurisdiction specifically distinguished from state courts; the Senate should be divested of executive and judicial powers, and the states should pay the salaries of federal senators and representatives; state legislatures should have the power to recall and replace federal senators; and all senators should be elected at the same time for four-year terms.³¹⁸ These amendments, the committee asserted, would “secure the blessings of freedom without injuring the nerves of Government.” The committee was certain that the people of Massachusetts “wished for, and expected further amendments, than those which have been recommended” by Congress. These new amendments would secure liberty “more explicitly.”³¹⁹

The committee’s report shocked the Federalists. Abigail Adams, the vice-president’s wife (then residing in New York), was sorry to find her home state “acting a part so derogatory to their Honour and interest.”³²⁰ She was pained “to see such a combination to destroy all

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. Letter from Abigail Adams to Cotton Tufts (March 7, 1790) (available in TUFTS PAPERS, Accession #13,324, Library of Congress).

order, & overthrow the constitution," and she hoped, "for the Honour of the State," that the proposed amendments, "which strike a deadly blow at the vitals of" the Constitution, would "be successfully combatted."³²¹

Abigail's son, John Quincy Adams, a law student in Newburyport, deplored the additional amendments as "further evidence of the petty arts which are used by the enemies to the national union to turn the tide of popular opinion against the national government."³²² Adams had been informed that those behind the scheme "never expected that any amendments would be seriously proposed to Congress by our Legislature."³²³ The committee report "was intended for a declamation to the people" illustrating the "dangerous tendency of the government."³²⁴

The committee report was read in the state senate, which ordered copies printed for the senators' use. Other business intervened, however, and the session neared an end. Antifederalists in the senate, sensing the mood of the people, believed it unwise to persist, "lest they should injure their own interest."³²⁵ Thus, the senate refused to take up the report.

Some confusion arose over Massachusetts' action on the amendments to the Constitution proposed by Congress. In March 1791, U.S. Secretary of State Thomas Jefferson wrote that, "[w]e know that Massachusetts has agreed to the amendments to the constitution, except (as is said) the 1st. 2d. & 12th. articles. The others therefore are now in force. The articles excepted will depend on the other legislatures."³²⁶ In August 1791, after nine states had adopted ten of the twelve amendments proposed by Congress, Jefferson wrote Massachusetts Senator Christopher Gore requesting an authenticated copy of the state's adoption.³²⁷ Massachusetts, according to Jefferson,

321. *Id.*

322. Letter from John Quincy Adams to John Adams (Apr. 5, 1790), in 1 WRITINGS OF JOHN QUINCY ADAMS, 51-52 (Worthington C. Ford ed., 1913).

323. *Id.*

324. *Id.*

325. Letters of Stephen Higginson, 1783-1804, in 1 ANNUAL REPORT OF THE AM. HIST. ASSOC. FOR 1896 776 (Wash., D.C., 1897) (March 24, 1790, letter from Stephen Higginson to John Adams).

326. Letter from Thomas Jefferson to William Short (Mar. 15, 1791) (available in SHORT PAPERS, Library of Congress).

327. Letter from Thomas Jefferson to Christopher Gore (Aug. 8, 1791) (available in Record Group 59, Dept. of State, Am. Letters, National Archives). Jefferson had failed to consider the effect Vermont's admission to the Union on March 3, 1791 would have on the adoption of the proposed amendments—eleven states were now needed to obtain the necessary three-fourths approval. *Id.*

"having been the 10th. state which has ratified, makes up the three-fourth[s] of the legislatures whose ratification was to suffice."³²⁸ After checking with the Secretary of the Commonwealth, Gore reported the embarrassing facts to Jefferson.³²⁹ The House had approved nine amendments and the Senate ten. The Senate then concurred with the House and a joint committee was appointed "to bring in a bill declaratory of their assent."³³⁰ Unfortunately, the committee never reported a bill, and thus Massachusetts officially had adopted none of the proposed amendments.³³¹ Not until 150 years later did Massachusetts along with Connecticut and Georgia adopt the Bill of Rights as part of their sesquicentennial celebrations in 1939.³³²

2. *Virginia's Debates*

The most serious debate over the proposed amendments occurred in Virginia. On September 28, 1789, Virginia Senators Richard Henry Lee and William Grayson sent Governor Beverley Randolph and the Speaker of the House of Delegates copies of Congress' proposed amendments, characterizing them as "inadequate to the purpose of real and substantial amendments, and so far short of the wishes of our Country."³³³ The senators had tried without success to obtain "those radical amendments proposed" by the Virginia convention.³³⁴ With no other amendments from Congress, Lee and Grayson predicted a "consolidated empire" and the loss of "civil liberty."³³⁵ The amendments would probably "do more harm than benefit."³³⁶

Lee and Grayson's letter alienated many Virginians, even some strong Antifederalists who had voted against the Constitution during the state convention.³³⁷ Some Antifederalists considered it "seditious

328. *Id.*

329. Letter from Christopher Gore to Thomas Jefferson (Aug. 18, 1791) (available in Record Group 59, Dept. of State, Misc. Letters, National Archives).

330. *Id.*

331. *Id.*

332. 5 ROOTS OF THE BILL OF RIGHTS, *supra* note 232, at 1172.

333. VIRGINIA SENATORS TO THE GOVERNOR OF VIRGINIA (Sept. 28, 1789), *reprinted* in 5 ROOTS OF THE BILL OF RIGHTS, *supra* note 232, at 1186.

334. VIRGINIA SENATORS TO THE SPEAKER OF THE HOUSE OF REPRESENTATIVES IN VIRGINIA (Sept. 28, 1789), *reprinted* in 5 ROOTS OF THE BILL OF RIGHTS, *supra* note 232, at 1187.

335. *Id.*

336. Letter from William Grayson to Patrick Henry (Sept. 29, 1789) (available in THE PATRICK HENRY PAPERS, Library of Congress).

337. Letter from David Stuart to George Washington (Dec. 3, 1789) (available in THE WASHINGTON PAPERS, Library of Congress).

and highly reprehensible."³³⁸ James Madison believed that it was "well calculated to keep alive the disaffection to the Government."³³⁹ Patrick Henry attempted to get the assembly to commend the senators for their "great vigilance . . . manifested in their letter," but, after he delivered a speech that did not "take well," the commendation "never stirred again."³⁴⁰

Governor Randolph sent the amendments to the Virginia legislature on October 19, 1789.³⁴¹ Patrick Henry moved that the House of Delegates postpone consideration of the amendments to the next assembly. Henry argued that since the assembly then sitting had been elected before the promulgation of the amendments, the delegates could not properly express the will of the people on the amendments. The people should consider the amendments and then vote for delegates who would represent their feelings on the subject. If the present assembly felt the need, it could "pass a vote of *approbation* along with the postponement, and Assign the reason of referring the *ratification* to their successors."³⁴² But, James Madison predicted, if the people, many of whom now wanted to give the Constitution a fair chance to operate, especially with George Washington at the helm, believed that Antifederalist leaders were merely biding time in a "war agst. the Genl Government," the move would "recoil" against them.³⁴³ Sensing that "the pulse of the House . . . did not beat with certainty in unison with his own," Henry left the assembly early, and, in mid-November, the delegates, by a large majority, rejected Henry's motion to postpone.³⁴⁴ A committee of the whole house then approved the first ten amendments from Congress by a large majority, but narrowly defeated the final two amendments by a vote of 64 to 58.³⁴⁵ Federalist Edmund Randolph led the opposition to these final two amendments arguing that they were ambiguous. Other Federalists feared the effect of the defeat of these last two

338. *Id.*

339. Letter from James Madison to George Washington (Dec. 5, 1789), 12 MADISON PAPERS, *supra* note 259, at 458.

340. Warren M. Billings, "That All Men Are Born Equally Free and Independent:" Virginians and the Origins of the Bill of Rights, in THE BILL OF RIGHTS AND THE STATES, *supra* note 225, at 362-63.

341. *Id.* at 364.

342. *Id.*

343. Letter from Edward Carrington to James Madison (Dec. 20, 1789), in 12 MADISON PAPERS, *supra* note 259, at 463.

344. Letter from James Madison to George Washington (Nov. 20, 1789), in 12 MADISON PAPERS, *supra* note 259, at 453.

345. Letter from Edmund Randolph to George Washington (Nov. 26, 1789) (available in THE WASHINGTON PAPERS, Library of Congress).

amendments: "some who have been decided friends to the ten first think it would be unwise to adopt them without the 11th. & 12th."³⁴⁶ Whatever the fate of Congress' amendments, most assemblymen believed that Virginia would apply for further amendments, in particular, a provision denying Congress the power to levy direct taxes.³⁴⁷ On November 30, the assembly considered the report of the committee of the whole, and, after debate, adopted all twelve amendments "by a pretty good Majority."³⁴⁸ Two days later the committee of the whole reported that the legislature, "in obedience to the will of the people," as expressed by the Virginia convention, ought to apply to Congress for additional amendments to the Constitution. The assembly accepted the report on December 5, 1789, and appointed a ten-man committee "to prepare a representation to the Congress."³⁴⁹

The Virginia Senate, sitting as a committee of the whole, first considered the Assembly's approval of the amendments on December 5th.³⁵⁰ Some senators wanted to adopt the amendments; others wanted to defeat them; and still others sought to postpone them to the next session.³⁵¹ Those who did not want to ratify immediately were "not dissatisfied with the amendments so far as they have gone, but are apprehensive that the adoption of them at this time will be an obstacle to the chief object of their pursuit," an amendment prohibiting direct taxation by Congress.³⁵²

On December 8th, the committee of the whole made its report, which the Senate adopted. Eight of the proposed amendments were adopted, but numbers three, eight, eleven, and twelve (the future First, Sixth, Ninth, and Tenth Amendments) were postponed to the next session.³⁵³ On December 12th, the senators favoring postponement explained their position. They asserted that the people of Vir-

346. Letter from Hardin Burnley to James Madison (Nov. 28, 1789), in 12 MADISON PAPERS, *supra* note 259, at 456. Madison quoted much of Burnley's letter in a letter to George Washington on December 5, 1789. 12 *id.* at 458-59.

347. 12 *id.*

348. Letter from Edward Carrington to James Madison (Dec. 20, 1789), in 12 *id.* at 464. Hardin Burnley reported that "the ten first were agreed to with even less opposition than they experienced in the Committee [of the whole] & that wh. passed on the 11th & 12th. was rescinded by a majority of about twelve." Letter from Hardin Burnley to James Madison, (Dec. 5, 1789), in 12 *id.* at 460.

349. The committee was composed of Ralph Wormeley, Edmund Randolph, Francis Corbin, Isaac Zane, Edward Carrington, Wilson Cary Nicholas, James Breckinridge, Henry Lee, Miles King, and Alexander Henderson. Billings, *supra* note 340, at 364.

350. *Id.*

351. Letter from Hardin Burnley to James Madison, (Dec. 5, 1789), in 12 MADISON PAPERS, *supra* note 259, at 460.

352. *Id.*

353. JOURNAL OF THE SENATE OF THE COMMONWEALTH OF VIRGINIA 61-66 (1790).

ginia and the other states would not have ratified the Constitution unless they were confident that significant alterations would be agreed upon. The four postponed amendments, in the judgment of the majority of senators, fell "far short of affording the same security to personal rights, or of so effectually guarding against the apprehended mischief of the government," as similar amendments proposed by the Virginia convention. Although "satisfied of the defects and dangerous tendency of these four articles," the majority was unwilling to reject them, but preferred to postpone their consideration to the next session so that the people would have an opportunity to consider the amendments and then communicate their feelings to the legislature.³⁵⁴

On December 14th, the minority of the Senate registered its objection to the postponement:

1st. Because that although the 3d, 8th and 12th of the said amendments come not fully up in form to those proposed by the Convention of this State, in June 1788, we are of opinion they are analogous thereto, and contain important and essential matter, tending further to secure to the States in the Union, and the people their inherent and undoubted political and natural rights, and are calculated the better to secure them against any undue encroachments of the Federal Government.

2dly. Because that by adopting these amendments, we by no means meant to abandon the prosecution or true constitutional grounds of other amendments, and considered the accepting of such as were at present offered as a measure better calculated to insure others, than either rejecting or postponing the consideration of them.

3dly. Because the 11th amendment, though not called for by any of the adopting States, we consider as tending to quiet the minds of many, and in no possible instance productive of danger to the liberties of the people, and because the constitution gives a right to Congress to propose, when two-thirds concur, amendments to the State Legislatures for their ratification.³⁵⁵

The assembly rejected the Senate's postponement. A conference committee met on December 12, but "both houses remain'd obstinate, consequently the whole resolution was lost, and none of the amendments [were adopted]."³⁵⁶ Edmund Randolph, now a member

354. *Id.*

355. *Id.* at 66-67.

356. Letter from John Dawson to James Madison (Dec. 17, 1789), in 12 MADISON

of the assembly, explained that "the most zealous" Federalists thought it best "to let the whole of them rest" rather than approving a partial list. Some Federalists hoped "to throw the odium of rejection on the senate."³⁵⁷ Other Federalists were disheartened with the failure to adopt the amendments, but James Madison felt that "it will do no injury to the Genl. Government. On the contrary it will have the effect with many of turning their distrust towards their own Legislature. The miscarriage of the 3d. art: particularly [i.e., the future first amendment], will have this effect."³⁵⁸

Some Antifederalists soon realized that they had made a mistake. Senator Richard Henry Lee wrote to Patrick Henry telling him that Congress would not propose additional amendments during its present session and that perhaps the Virginia legislature should have adopted the amendments already proposed by Congress.³⁵⁹ Such protections, he declared, would have inculcated in the people's mind that government was indeed limited and that rulers were always a potential threat to rights. Additionally, Lee believed that we ought to get "as much as we can at different times," so that one day most of our rights might be protected.³⁶⁰ Consequently, Lee felt that the people ought to be encouraged to elect new federal representatives who would support further amendments to the Constitution.³⁶¹ The year-long struggle over amendments to the Constitution was nearing a climax. Senators Richard Henry Lee and John Walker (the replacement for William Grayson, who had died in March, 1790 on his way to Congress) wrote the Speaker of the Virginia House of Delegates on August 9, 1790, that

the Assent of our Commonwealth may, we humbly conceive, secure the establishment of principles, that, by being fixed on the minds of the people, will be conducive hereafter to arrest the progress of power, should it be disposed to exert itself in future times to the injury of public liberty.³⁶²

PAPERS, *supra* note 259, at 461.

357. Letter from Edmund Randolph to George Washington (Dec. 15, 1789) (available in THE WASHINGTON PAPERS, Library of Congress).

358. Letter from James Madison to George Washington (Jan. 4, 1790), in 12 MADISON PAPERS, *supra* note 259, at 466-67.

359. Letter from Richard Henry Lee to Patrick Henry (June 10, 1790), in 2 THE LETTERS OF RICHARD HENRY LEE 522-25 (James Curtis Ballagh ed., 1914).

360. 2 *id.*

361. 2 *id.*

362. Letter from Richard Henry Lee and John Walker to the Speaker of the Virginia House of Delegates (Aug. 9, 1790) (available in EXECUTIVE COMMUNICATIONS, Virginia State Library).

During early 1791, Congress debated the reapportionment of the House of Representatives based upon the federal census of 1790. Virginians feared that they might not fare well in this realignment. Consequently, on October 25, 1791, the Virginia assembly adopted the first amendment proposed by Congress, which dealt with the apportionment of the House of Representatives.³⁶³ On November 3th, the state Senate also accepted this amendment, and the following day, Governor Randolph transmitted the ratification to President Washington. This action overcame the legislature

's inertia, and on December 5, 1791, the assembly adopted the remaining eleven amendments. Ten days later, the Senate adopted the amendments. A week later, Governor Henry Lee sent Virginia's ratification to President Washington.³⁶⁴

H. *Final Ratification*

On December 30th, the President laid Virginia's ratification before Congress.³⁶⁵ Not until January 18, 1792, however, did the President deliver Vermont's official adoption of the amendments to Congress.³⁶⁶ With this transmittal, ten amendments to the Constitution had been adopted. On March 1, 1792, Secretary of State Thomas Jefferson notified the state executives that the first ten amendments to the Constitution—the Bill of Rights—had been adopted by three-fourths of the state legislatures and were now part of the Constitution.³⁶⁷

363. Billings, *supra* note 340, at 366.

364. *Id.*

365. 5 ROOTS OF THE BILL OF RIGHTS, *supra* note 232, at 1201-02.

366. 5 *id.* at 1202.

367. 5 *id.* at 1171, 1203.